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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

No. 13 Original

October Term, 1955

STATE OF WISCONSIN,
Plaintiff,

v.

STATE OF TENNESSEE,
Defendant.

REPLY BRIEF OF THE STATE OF WISCONSIN IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

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THE GILMAN PRESS, MADISON, WISCONSIN

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We find no rule that either authorizes or prohibits a reply brief in an action seeking to invoke the original jurisdiction of this court. Accordingly, we are tendering this short statement for such use as the court may choose to make of it.

In reply to the brief in opposition to the motion, the State of Wisconsin respectfully suggests to this Honorable Court:

Tennessee has not filed any pleading in this action. Hence, we regard the brief filed by Tennessee as, in effect, a demurrer. Therefore, the allegations of the proposed complaint stand uncontroverted and as verities in this action.

(1) "the provisions of Public Chapter No. 74 of the Laws of Tennessee of 1955 * * * will * * * hamper,

impede and destroy interstate commerce in milk between the producers in the State of Wisconsin, and the consuming public in the State of Tennessee";

(2) "The State of Tennessee * * * has made provisions for the enforcement of said chapter * * *;

(3) "(Public Chapter 74) * * * discriminates against producers in the State of Wisconsin * * *"

(4) "substantial quantities of milk produced in Wisconsin have been sold in Tennessee."

(5) "any interference with the development of the widest possible market for fluid milk * * * tends to depress the price in Wisconsin of all milk * * *"

(6) "the owners and operators of the 107,000 dairy farms in Wisconsin * * * with their families constitute about one-seventh of the total population * * *"

While Tennessee has answered in a most scholarly and lawyer-like manner our proposed complaint filed herein, Tennessee has glossed over the critical point at issue and that is the significant complaint that although the Tennessee statute involved herein does make certain acts, namely the selling of milk at less than the prevailing market price, illegal only when done with the intent to monopolize, *the mere doing* of such acts is prima facie evidence of the intent. The fact that *some* Tennessee producers and shippers *may* also be subject to the same which *necessarily* applies to *all* Wisconsin producers and shippers does not remove the obvious burden on interstate commerce which this statute creates.

The defendant cites *Milk Control Board v. Eisenberg Farm Products*, 306 U. S. 346 (which was a case involving only producers residing within one state) as sustaining its position that the statute here in question is not invalid. We respectfully suggest to the Court that the Pennsylvania statute involved in that case applied equally to all Pennsylvania producers and shippers and that no question involving a foreign shipper was there presented. In short, in contrast with the instant case, it did not discriminate against milk shipped in interstate commerce.

In reply to the defendant's second argument, we respectfully suggest that it is dependent upon the first. Here the State of Wisconsin has adequately alleged the injury that is certain to result from the provisions for the enforcement of the law in question and the State of Tennessee has denied neither the certain injury nor the provisions for enforcement. The distinction made between the instant case and that in *Pennsylvania v. West Virginia*, 262 U. S. 553 which is based upon the present law's application only to the doing of "certain acts with a certain intent," is unreal in that the law makes the very doing of such acts by Wisconsin producers and shippers *prima facie evidence* of the improper intent. This presumption does not apply to local producers and shippers.

In reply to the defendant's third argument, the State of Wisconsin calls attention to the prima facie nature of the discrimination and the uncontroverted allegations of the effects such discrimination is certain to produce. If the defendant proposes to take the position that the enforcement will not injure the State of Wisconsin or its dairy industry, it should controvert the facts alleged by filing

an answer herein. That will then properly raise an issue of fact which can be determined in the appropriate manner.

CONCLUSION

The State of Wisconsin respectfully submits that leave to file the complaint herein should be granted.

Respectfully submitted,

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Attorney General

STEWART G. HONECK
Deputy Attorney General

ROY G. TULANE
Assistant Attorney General

GEORGE F. SIEKER
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned, a member of the bar of the Supreme Court of the United States, and one of the counsel of record for the plaintiff, hereby certifies:

That on the 19th day of December, 1955, he served the within and foregoing "Reply Brief in Support of Motion for Leave to File Complaint" upon the sovereign State of Tennessee, the defendant in said action, in the following manner, as prescribed by Rules 9 and 33 of said Court:

He deposited at the post office at Madison, Dane County, Wisconsin, two copies of the within and foregoing Reply Brief, securely enclosed in an envelope, air mail postage duly prepaid, addressed to attorney for said defendant State, at his post office address, as stated below, that is to say:

Honorable George F. McCanless
Attorney General of the State of Tennessee
State Supreme Court Building
Nashville, Tennessee

.....

Stewart G. Honeck